Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

PETITION FOR RECONSIDERATION OF EARTHLINK, INC.

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SUMMARY

EarthLink respectfully urges the Commission to reconsider its decision to eliminate the line sharing UNE. On both the merits and the procedures, errors were made that, when corrected, compel the Commission to reverse course.

On the *merits*, the line sharing decision is fundamentally inconsistent with the impairment analysis set out in the Order. The decision on line sharing affirmatively harms the Section 706 goals for broadband deployment by undermining facilities-based CLECs providing wholesale ADSL alternatives in the residential mass market, and contradicts the Commission's approach to copper loops under the rules applicable for the ILEC legacy network. Further, the line sharing decision misapplies the impairment standard by assuming that CLECs must bundle all conceivable services to overcome the ILECs' inherent legacy cost advantages. The line sharing decision also contradicts the Order's substantive response to the *USTA* remand issues, and wrongly assumes that the *USTA* Court had foreclosed the Commission's options on line sharing. Finally, the Commission makes errors of fact and law regarding the impact of line splitting on the line sharing impairment analysis. EarthLink urges the Commission to reinstate the line sharing UNE or, in the alternative, reinstate and provide the states with the authority to conduct a granular analysis on line splitting use and availability.

EarthLink also urges the Commission to provide a transition mechanism on reconsideration that will better address the consumer disruption and public interest issues likely to result from the elimination of the line sharing UNE. The Commission should halt the transition rate increases for line sharing until such time as the industry has developed and implemented an intramodal "hot cut" mechanism to transfer end-user DSL connections from one carrier to another. Without this mechanism, the Commission's transition will likely strand

hundreds of thousands of consumers without DSL service when and if the data CLECs exit the market.

On *procedure*, EarthLink urges the Commission to reconsider the line sharing decision because it was plagued with irregularities that make it glaringly illegal. The Commission conducted a post-February 20, 2003, private, invitation-only rule making in violation of the open rule making obligations of Section 553 of the APA. Further, the Sunshine Act was violated when the Commission voted on a "roughly conceived outline" and had no final rules and decision at the February 20, 2003, open meeting. The volume of post-decisional *ex parte* presentations during the "sunshine period" also demonstrates abuse of the FCC's *ex parte* rules. Finally, the APA and the Communications Act were violated because: (a) the Commission failed to consider the line sharing UNE on its merits; and (b) the Commission failed to explain the basis for its compromise in the Order, thereby frustrating the statutory role of reviewing appellate courts.

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EarthLink, Inc. ("EarthLink"), by its attorneys and pursuant to Section 1.429(a) of the Commission's rules,[1] files this Petition for Reconsideration of the Report and Order and Order on Remand ("Order") in the above-referenced proceedings.[2] EarthLink urges the Commission to reconsider the elimination of line sharing as an unbundled network element ("UNE"). EarthLink provides broadband Internet access to approximately one million end user subscribers, adding more broadband customers each day, with most accessing the Internet using DSL technology over the high frequency portion of the local loop ("HFPL"). The elimination of the line sharing UNE is almost certain to eliminate all but incumbent local exchange carriers ("ILECs") as wholesale providers of broadband transport for Internet access. This result is wholly inconsistent with the Commission's objective to foster broadband deployment and competition and the statutory obligations of Section 706 of the Communications Act ("Act").

[1] 47 C.F.R. §1.429(a).
[2] Report and Order and Order On Remand and Further Notice of Proposed Rulemaking, FCC 02-36, 68 Fed. Reg. 52276 (Oct. 2, 2003) ("Order").

DISCUSSION

I. THE LINE SHARING IMPAIRMENT ANALYSIS IS ARBITRARY AND INCONSISTENT WITH REGULATORY AND JUDICIAL PRECEDENT

A. The FCC's Decision to Eliminate the Line Sharing UNE is Arbitrary and Internally Inconsistent

The Commission's review of the merits of the line sharing UNE is flawed and should be corrected to be consistent with the Act and with the goal to enhance broadband connectivity. Specifically, the decision to eliminate UNE access to the HFPL through line sharing is: contrary to the goals of Section 706 of the Telecommunications Act of 1996 to promote broadband deployment; based on unachievable revenue projections that are neither supportable nor supported in the record; contrary to the impairment analysis and methodology required in the Act and set forth in the Order; internally inconsistent with the Commission's treatment of such factors as Section 271 compliance; based on a view of line splitting that is not supported by the record and contrary to the potential of line splitting; and based on a mistaken interpretation of the relationship between line sharing rates and cost allocation requirements.

1. Elimination of Line Sharing Contradicts the Order's Approach To Broadband under Section 706 of the Act and Relies on Other Factors Rejected in the Order

The Order establishes a policy approach of bifurcating UNE obligations between the ILEC "legacy" network (e.g., copper loops) and the ILEC "new" network (e.g., fiber-to-the home).[3] The Commission explains that its Section 706 obligation to ensure deployment of advanced telecommunications capability warrants different treatment of existing loop plant and

[3] The Commission notes, "excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.... At the same time, continued unbundling for the network elements provided over current facilities appears to be necessary in many areas under section 251 of the Act, especially with respect to mass market customers." Order, ¶ 3.

new loop plant.[4] The Order asserts that, consistent with the "at a minimum" statutory language, implementation of Section 706 broadband deployment goals supports this bifurcated approach.[5]

The Order, however, fails to follow through on that approach in the line sharing decision. As the Order's policy explains, the legacy rules should continue to apply to the copper loop and there is no basis, or explanation in the Order, to conclude that the HFPL (copper loop) should somehow be treated differently. Indeed, since the Commission decided to weigh broadband deployment goals so heavily, the case is even stronger for maintaining the line sharing UNE. Line sharing, affirmatively promotes the Section 706 mandate by allowing competitive local exchange carriers ("CLECs") to lease the HFPL of existing copper loop, to deploy the CLECs' own DSLAM facilities, and to offer competitive DSL services on a wholesale basis to Internet Service Providers ("ISPs"). This alternative to the ILEC wholesale DSL offerings, in turn, allows ISPs to offer competitive broadband information services to consumers,[6] including at speeds and technical characteristics that are not offered by the ILECs. [7]

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[4] "Therefore our obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation. Because the incumbent LEC has already made the most significant infrastructure investment, i.e., deployed the loop to the customer's premises, we seek, through our unbundling rules to encourage both intramodal and intermodal carriers (in addition to incumbent LECs) to enter the broadband mass market and make infrastructure investments in equipment. In addition, we seek to promote the deployment of equipment that can unleash the full potential of the embedded copper loop plant so that consumers can experience enhanced broadband capabilities before the mass deployment of fiber loops." Order, ¶244.

[5] Order, ¶¶ 172-177.

[6] Wholesale DSL provisioning to ISPs will "stimulate the development and deployment of broadband services to residential markets in furtherance of the Commission's mandate to encourage the deployment of advanced telecommunications capability to all Americans." *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶20 (1999).

[7] According to the FCC's most recent data, there are 6.5 million ADSL lines in service in the U.S., growing at an annual rate of 27 percent and 95.1 percent of those lines are provided by ILECs, with the BOCs alone providing 86 percent. High Speed Services for Internet Access:

While the Order properly recognizes the need to maintain UNE access to the legacy local loop,[8] the Order provides no basis to deny access to the HFPL of the legacy local loop. To the contrary, the Commission acknowledges that there are no alternatives to the local loop and that the competitive provision of DSL transmission services has fostered both facilities-based telecommunications competition as well as information services competition.[9] Only time will tell whether declining to regulate "new" fiber ILEC networks spurs investment as the Commission hopes; however, eliminating access to legacy facilities that provide broadband services today is directly contrary to stated broadband goals.

In the same way, the line sharing decision relies on other factors that are rejected in other portions of the Order, effectively establishing an incoherent line sharing unbundling standard. For example, according to the Commission, "requesting carriers are generally impaired on a national basis without access to an incumbent LEC's local loops*, whether they seek to provide narrowband or broadband services*, or both."[10] For purposes of the copper loop, the Commission's impairment analysis is independent of the type of services the CLEC wishes to offer. For reasons that are not explained, however, the line sharing impairment analysis of the same copper loop assumes the CLEC will provide a bundled package of voice, data, and video services.[11] The application of these inconsistent standards leads to absurd results – UNE access to the whole copper loop is permitted under one "impairment" test to provide either voice or data

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Status as of December 31, 2002, FCC Wireline Competition Bureau at Tables 1, 5 (rel. June 10, 2003) ("High Speed Services Report").

[8] Order, ¶ 248.

[9] Order, ¶233.

[10] Order, ¶248 (emphasis added). *See also* Order, ¶ 250 (unbundling ensures "that requesting carriers have access to the copper transmission facilities they need in order *to provide narrowband or broadband services (or both) to customers served by copper local loops*." (emphasis added)).

[11] Order, ¶261.

only, but then later, under a different unbundling standard, the HFPL of the same copper loop cannot meet "impairment" standard.

Nor does the Order explain how the approach taken to line sharing is consistent with the ILECs' Section 251(c) duty to provide UNE access to "*any* requesting telecommunications carrier."[12] The statute, on its face, would allow the carrier *of any telecommunications service* to obtain access, and so would forbid the Commission's choice to evaluate line sharing impairment only for the highly hypothetical CLEC with "increased revenue opportunities"[13] from a bundled broadband data, voice and video services. The Commission simply has no authority to require CLECs to offer a bundled package of services in order to compete in the mass market broadband transport business.[14]

Further, while the Order concludes that the need for a line sharing UNE is mitigated by the competitive conditions established by the approval of 43 Section 271 applications,[15] other parts of the Order refuse to give similar weight to the Section 271 grants. For example, the Commission rejects ILEC proposals to use compliance with Section 271 performance metrics as a test for removal of unbundling requirements,[16] and refuses to rely on the ILECs' hot cut performance in the Section 271 process as probative of the hot cut performance required for removal of the switching UNE.[17]

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[12] 47 U.S.C. § 251(c)(3) (emphasis added).
[13] Order, ¶ 258.
[14] Indeed, once again, the Order is contradictory: on the one hand, the impairment analysis is not dependent on a particular CLEC business model or entry strategy (Order, ¶ 115), but the line sharing portion of the Order asserts that costs of the whole loop would be offset by revenues assuming the CLEC adopts an all-in-one bundle business strategy (Order, ¶ 258).
[15] Order, ¶259.
[16] Order, ¶342.
[17] Order, ¶469, n. 1435 ("Moreover, contrary to their contentions, the Commission's prior finding in section 271 orders do not support a finding here that competitive carriers would not be impaired if they were required to rely on the hot cut process to serve all mass market

Finally, and in the alternative, the Commission should consider a "granularity" analysis for line sharing that would more appropriately gauge the degree to which line splitting can be viewed as a feasible alternative to line sharing. Indeed, the Order cites no evidence of actual implementation success of line splitting on a national level. On the one hand, despite a finding of national impairment, the Order allows the states to rebut such a finding with regard to many local access facilities – dark fiber loops, DS3 loops, DS1 loops and local switching – where it was not possible for the Commission to engage in the necessary granular analysis.[18] This same "granular" approach, however, is needed for line sharing. Moreover, given the possibility that the elimination of line sharing could have a particularly devastating impact on residential consumers and small business customers,[19] the Commission should at the very least delegate to the states the authority to undertake a more granular analysis of the implementation and availability of line splitting, consistent with the *USTA* decision and the Order.

2. The Commission Fails to Balance the Costs and Benefits of Line Sharing

The line sharing decision is based on a faulty factual premise that distorts the analysis of the costs and benefits of line sharing; when corrected, it is clear that the line sharing UNE should be reinstated. Specifically, the Order assumes that the costs of the entire loop do not impair the

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customers."). Significantly, the Commission also finds that the unbundling requirements of Section 271 shall be retained despite the elimination of such requirements for purposes of Section 251. Order, ¶653.

[18] The Commission noted that delegation to the states is appropriate where "the record before us does not contain sufficiently granular information and the states are better positioned to gather and assess the necessary information. A more granular analysis will also benefit small businesses by considering the differing levels of competition in rural and urban markets and the differing needs and resources of carriers serving mass market and small to medium business customers." Order, ¶188.

[19] *See* Letter from Charles Hoffman, President and CEO, Covad Communications and Charles Garry Betty, President and CEO, EarthLink, Inc., to Chairman Michael Powell, FCC, June 12, 2002 (attached to June 13, 2002 *ex parte* letter, CC Docket Nos. 01-338, 96-98, 98-147) ("Covad/EarthLink Letter").

CLEC because the analysis "take[s] into account the fact that there are a number of services that can be provided over the stand-alone loop, including voice, voice over xDSL (e.g., VoDSL), data, and video services" which provide "increased revenue opportunities" to offset loop costs.[20]

This fact premise is not grounded in the record, nor can it be. Indeed, the Order provides no revenue analysis at all on the hypothetical bundling of CLEC voice, data and video services showing that plausible CLEC revenue streams would justify such a conclusion. Indeed, the Commission's most recent *Video Programming Competition Report* concludes that video over ADSL "remain[s] in the trial stage."[21] Moreover, while Qwest offers video services via VDSL in just four markets, it does so using a hybrid fiber network, not "home run" copper, and the VDSL has a distance limitation of just 4,000 feet from the ILEC central office.[22] The Commission itself, therefore, has acknowledged the speculative and limited nature of video applications using the telephony network, and so could not possibly have used market evidence to examine impairment and "increased revenue opportunities" as the line sharing portion of the Order (¶ 258) asserts.[23] In addition, this premise is irrelevant to the articulated "impairment" standard of the Order, which looks only to revenues "that a competitor can reasonably be expected to gain over the facilities", and such findings are to be based on "*evidence of the*

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[20] Order, ¶ 258.
[21] Id. *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd. 26901, ¶ 98 (2003).
[22] "By using existing fiber in the neighborhood, Qwest reaches within 4,000 feet of a customer's location . . .", *found at*, Qwest Choice TV & Online – VDSL Technology," http://www.qwest.com/vdsl/learn/vdsl.html. *See also*, "Video Offerings May be Key to Success of Rural Broadband," Telecommunications Daily, at 4 (Sept. 29, 2003) (ILEC industry official asserts that ILEC video applications are needed to justify fiber-to-the-home investments).
[23] *Compare with*, Order, ¶ 93 ("actual marketplace evidence is the most persuasive and useful kind of evidence" in an impairment analysis), *and*, Order, ¶ 98 (if "there are limitation on the number or types of customers that can be served by a particular technology, we will consider whether an entrant could use this technology profitably to target only those customers that can be served by the alternative technology.") .

revenue opportunities available."[24] The line sharing discussion, by hypothesizing on no more than a thinly conceived and unsupportable "revenue opportunity," has no proper place in the impairment analysis.[25]

The Order also improperly ignores the impact of its decision on the competitive provision of wholesale DSL service to ISPs. Not a single market participant has emerged as a reasonable substitute for ILEC wholesale DSL transmission services other than the CLECs offering DSL through the HFPL. According to the Commission's own statistics, ILECs provide over 95 percent of the ADSL lines in the United States, while CLECs provide slightly more than 4 percent.[26] For various reasons, satellite, terrestrial wireless, power line communications and cable modem providers do not offer practical alternatives for wholesale broadband transmission. While Commission statistics indicate that cable modem providers have a greater share of overall retail broadband services, ISPs by and large do not have access to the cable modem platform. The line sharing decision, however, strains the CLEC s' financial ability to provision a competitive wholesale alternative to the ILECs' ADSL, and thereby directly diminishes wholesale broadband services in the market. The Order fails to balance these effects of the line sharing decision.

The *USTA* decision[27] is also not addressed in a balanced or consistent manner. While the *USTA* decision required the Commission to consider the relevance of broadband competition

[24] Order, ¶ 100 (emphasis added).
[25] Moreover, the Order (¶ 261) incorrectly ascribes the provision of "a broadband-only service to mass market consumers, rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service" as a social cost of line sharing. For a Commission intent on fostering broadband deployment this is hardly a legitimate basis to eliminate line sharing. *See* Order, ¶ 212 ("Broadband deployment is a critical domestic policy objective that transcends the realm of communications.").
[26] High Speed Services Report, at Table 5.
[27] USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

from cable and satellite providers when assessing its line sharing rules, [28] the Commission did so. Specifically, the Commission states "we do not find the presence of intermodal alternatives dispositive in our impairment analysis…."[29] The Commission further explains, cable has "first-mover advantages and scope economies not available to other new entrants," making the presence of cable modem competition less relevant, if at all, in the impairment analysis.[30] Indeed, the Commission states that less weight should be given to "intermodal alternatives that do not contribute to the creation of a wholesale market in accessing the customer or do not provide evidence that self-deployment of such access is possible to other entrants."[31] Accordingly, there is no basis for the contradictory position in the line sharing portion of the Order that cable modem retail competition "helps alleviate any concern that competition in the broadband market may be heavily dependent on unbundled access to the HFPL."[32] Ultimately, the line sharing portions of the Order fail to answer the issue raised by the *USTA* Court, *i.e.*, why, if at all, current intermodal alternatives alter the impairment analysis for line sharing.

Finally, the *USTA* decision expressly anticipates, and certainly does not foreclose, the Commission's reinstatement of the line sharing UNE. First, while it "vacated and remanded," the *USTA* decision, in the very next sentence the Court expressly anticipated a remand and reinstatement of line sharing: "[o]bviously any order unbundling the high frequency portion of

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[28] Order, ¶262.
[29] Order, ¶97.
[30] Order, ¶ 98. Further, the Commission has also recently concluded that cable operators do not provide transmission service at wholesale: "[n]one of the foregoing business models by which cable operators provide cable modem service appears to include the offering of any transmission service by a cable operator to an ISP or other information service provider." *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 51 (2002), *appeal pending* (footnotes omitted).
[31] Order, ¶ 98.
[32] Order, ¶ 263.

the loop should also not be tainted by the sort of error . . . ."[33] The Court's actions further confirm this: *first*, the *USTA* decision affirmed the Commission's authority to require line sharing;[34] and, *second*, after the decision was issued, the Court granted a petition to stay the effectiveness of its line sharing decision,[35] as well as the Commission's request to extend the stay pending the completion of the Triennial Review proceeding.[36] The Court surely would not have acted in this manner if it believed that the *USTA* decision effectively ended further Commission action on remand to reinstate the line sharing UNE. Moreover, in at least one recent case, the Commission has reinstated rules after the D.C. Circuit vacated and remanded those same rules.[37]

B. The Limited and Prospective Availability of Line Splitting Cannot Support The Elimination of Line Sharing

The Order concludes that CLECs are not impaired without HFPL access due to the availability of line splitting.[38] Yet, while the Commission notes that competitors are serving greater numbers of voice customers, it fails to address the Order's correct finding that no competitive alternatives exist for wholesale customers of ADSL services.[39]

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[33] USTA, 290 F.3d at 429. Moreover, in the very last paragraph of the *USTA* decision, the Court drops its "vacate" language entirely, and states "[w]e grant the petitions for review, *and remand both the Line Sharing Order and the Local Competition Order to the Commission* for further consideration in accordance with the principles outlined above." Id., at 430 (emphasis added).
[34] 290 F.3d at 430.
[35] Order dated 9/4/2002 (D.C.Cir.2002).
[36] Order dated 12/23/02 (D.C. Cir 2002)(extending stay until Feb. 27, 2003).
[37] In USTA v. FCC, 227 F.3d 450 (D.C. Cir. 2000), the Court "vacate[d] the provisions of the *Third Report & Order* dealing with the four challenged [CALEA] punch list capabilities, and remand[ed] to the Commission for further proceedings consistent with this opinion." Id., at 466. On remand, the FCC reinstated the vacated and remanded four CALEA punch-list items. *In the Matter of Communications Assistance for Law Enforcement*, Order on Remand, 17 FCC Rcd. 6896, ¶ 1 (2002) (reinstating items that had been "vacated" by the D.C. Circuit).
[38] Order, ¶ 259.
[39] Order, ¶ 97.

Further, there is no record evidence that line splitting is currently a viable competitive alternative.[40] To the contrary, recent information underscores that even with line splitting, CLECs will only be able to serve a small fraction of the consumers they can serve today using line sharing.[41] In addition, ILECs do not have the necessary processes in place to support line splitting arrangements.[42] According to evidence submitted by the CHOICE Coalition and MCI, line splitting is not a functional substitute for line sharing and the BOCs' OSS for line splitting creates unnecessary costs for CLECs and their customers, delays in obtaining service, unnecessary administrative burdens, and results in discriminatory treatment for CLEC customers thereby placing the CLECs at a severe competitive disadvantage.[43] In its *Line Sharing Order*, the Commission properly rejected arguments that the availability of stand alone loops obviated the need for line sharing and correctly treated line splitting as adjunct to, not a substitute for, line sharing.[44] Given that the Commission's assumptions regarding the viability of line splitting are incorrect, they cannot serve as a basis for eliminating the line sharing UNE.

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[40] The only evidence referenced by the Commission is a Covad press release announcing its *plans* to enter into a line splitting agreement with AT&T. Order, n.767.
[41] *See* Emergency Joint Petition for Stay by the Choice Coalition, CC Docket Nos. 01-338, 96-98, 98-147 (Aug. 27, 2003).
[42] *See id.* and Letter from Kimberly Scardino, MCI, to Marlene Dortch, FCC, CC Docket Nos. 01-338, 96-98, 98-147, WC Docket Nos. 03-167, 03-138 (Sept. 5, 2003).
[43] *Id.*
[44] *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order on Reconsideration, 16 FCC Rcd 2101, 2110 (2001) ("...*independent* of the unbundling obligations associated with the high frequency portion of the loop that are described in the *Line Sharing Order*, incumbent LECs must allow competing carrier to offer both voice and data service over a single unbundled loop.") (emphasis added).

C. The UNE Price of Line Sharing is not "Irrational" and Is Not A Valid Basis to Eliminate Line Sharing

The Commission also finds that eliminating line sharing will result in "better competitive incentives" due to the difficulties of pricing the HFPL.[45] The Commission notes that there is no single correct method of allocating loop costs among multiple services.[46] Of course, the Commission already has rules that ILECs must use to ensure loop costs are appropriately allocated, and which ensure that ILEC prices are cost-based.[47] If the Commission is concerned that the cost allocation rules are not sufficiently allocating the costs of the HFPL, the answer is not to eliminate the CLECs' ability to provide DSL services economically, but to revise the rules so that costs are properly allocated. Indeed, in the 1999 *GTE DSL MO&O*, the Commission faced this same question and decided to refer the question of xDSL cost allocations to a Joint Board;[48] subsequently, the Commission imposed an allocation and separations "freeze."[49] Thus, if line sharing prices are a concern, it is one of the Commission's own creation.

Moreover, no evidence supports the Commission's vague assertion that state line sharing pricing presents a "dilemma."[50] Contrary to the Order, CLECs do not have an "irrational" cost

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[45] Order, ¶260.
[46] Order, ¶260.
[47] 47 C.F.R. § 36.
[48] *In the Matter of GTE Telephone Operating Co.s*, Memorandum Opinion and Order, 17 FCC Rcd. 27409, ¶ 9 (1999) ("NARUC raises separations and cost allocation issues that go beyond the scope of the limited issue that was subject to investigation in this tariff proceeding. These are important questions that we intend to address in a separate proceeding in conjunction with the Federal-State Joint Board. Accordingly, we refer NARUC's petition to the Joint Board proceeding in Docket No. 80-286.") ("*GTE DSL MO&O*").
[49] *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd 11382, ¶ 2 (2001) (order "impose[s] an interim freeze of the Part 36 category relationships and jurisdictional cost allocation factors" for ILECs).
[50] Order, ¶ 260.

advantage.[51] Line sharing prices are rational and nondiscriminatory: the ILECs charge themselves the same price (e.g., zero) for use of the HFPL as line sharing CLECs obtain it for. As BellSouth recently explained, "no 'loop costs' are allocated to the interstate jurisdiction as a result of DSL deployment. This is because the provision of DSL has no impact on cable and wire facilities, circuit equipment, or working loop counts (either pre or post freeze)."[52] If the ILEC allocates no loop costs to provide DSL, then it is well within the state's discretion to determine that those are the costs of the HFPL.[53] Indeed, the Commission notes that the states have faithfully adhered to the line sharing pricing rules.[54] By contrast, without line sharing (or with the 25%, 50%, and 75% loop price increases adopted in the transition mechanism), the ILECs will have a DSL cost advantage while CLECs will have to purchase the whole loop and recover all of the loop costs from its DSL service. Such a result would be irrational, particularly given the Commission's intention of meeting the "statutory goals of encouraging competition and innovation in all telecommunications markets."[55] If the Commission reinstates line sharing, however, the costs of providing DSL will decrease, thereby benefiting consumers.

II. THE TRANSITION FAILS TO ADDRESS THE ISSUE OF CUSTOMER SERVICE DISRUPTION DUE TO ELIMINATION OF LINE SHARING

While the Commission's stated intention is to minimize disruption to customers,[56] the transition mechanism it adopts will not accomplish that goal. As EarthLink explained

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[51] The statute establishes the standards states use for pricing UNEs and requires that prices are cost-based, nondiscriminatory, and may include a reasonable profit. 47 U.S.C. §252(d)(1).
[52] *Ex parte* letter from Mary L. Henze, BellSouth, to Jane Jackson, FCC, CC Dkt. No. 02-33, at 1 (filed July 8, 2003); *see also, ex parte* letter from W. Scott Randolph, Verizon, to Carol Mattey, FCC, CC Dkt. No. 02-33, 95-20 and 98-10, at 7 (filed June 26, 2003) (same).
[53] *See* Reply Declaration of Terry L. Murray, Covad Reply Comments, CC Dkt. Nos. 01-338, 96-98, 98-147 (Jul. 17, 2002) at 35.
[54] Order, ¶260.
[55] Order, ¶261.
[56] Order, ¶266.

previously, accommodating the CLECs' transition or exit from the market is not the only transitional issue that the Commission faces.[57] Indeed, the easing of CLEC financial issues should not have been the substantial focus of transition issues, at all. The transition merely indicates that line sharing will not be eliminated immediately, but there remains a substantial public interest in an appropriate mechanism or process for *customers* to be transitioned to other providers and avoid DSL service disruption, which was unaddressed in the Order. For existing customers, the length of service during the transition is uncertain because data CLECs may be forced at any time, due to escalating line sharing "transition" costs, to exit the market, stranding ISPs and their end user customers. To the best of EarthLink's knowledge, however, no carrier solution exists for a seamless "hot cut" process to move DSL-based customers from one (exiting) carrier to another (e.g., ILEC).

Until the industry accepts a "hot cut" process for intramodal wireline migration of DSL subscribers from one carrier to another, EarthLink urges the Commission to modify its line sharing rule by deferring the line sharing loop charges. This will provide incumbent LECs with proper incentives to formulate a workable "hot cut" process for the sake of consumers, and avoid pushing data CLECs out of the market immediately. The public interest demands that this issue not be left to the Section 214 discontinuance proceedings, where the exiting carrier would be either bankrupt or have no business reason to work out a "hot cut" solution to the detriment of all consumers and ISPs involved.

[57] *See* Covad/EarthLink Letter and Letter from Mark J. O'Connor, on behalf of EarthLink, to Marlene Dortch, FCC, CC Docket Nos. 01-338, 96-98, 98-147, 02-33, 95-20, 98-10, 01-337 (Feb. 6, 2003).

III. THE VIOLATIONS OF APA, THE SUNSHINE ACT, AND FCC PROCEDURES WARRANT A FULL REINSTATEMENT OF THE LINE SHARING UNE

The facts and circumstances of the issuance of the Order and the February 20, 2003, Commission meeting demonstrate a process gone awry – from the failure of the Commission to address line sharing solely on its merits; the post-February 20, 2003, *ex parte* contacts between only certain industry participants and certain Commissioners and their staff; and the post-February 20th changes made to the February 20th terms. These events significantly impacted the line sharing portions of the Order released six months later. Indeed, the Commissioners, by a 4-to-1 margin, agreed that the public interest would best be served by a line sharing UNE. On reconsideration, the Commission should correct these errors by reinstating the line sharing UNE.

A. The Facts Show Highly Irregular Procedures Culminating in the Final Line Sharing Portions of the Order

On February 20, 2003, the Commission held an open meeting to consider the final order in Docket 01-338.[58] The evidence demonstrates, however, that a final order was not then considered, and in fact, not even prepared. Rather, at most, an outline was discussed and voted upon.[59] Even more changes than anticipated were necessary, as on August 21, 2003, Commissioner Adelstein wrote: "the fact that *significant portions of the drafting were not begun in earnest until after the vote* prevented a simultaneous release. We strived to finalize this order

[58] FCC Commission Meeting Agenda (rel. Feb. 13, 2003).

[59] In his September 20, 2003, statement, Commissioner Adelstein wrote: "*We are voting on this item before we have seen a draft reflecting the latest cuts*. This is especially troubling to me on issues of this magnitude. The lights were burning brightly on the eighth floor late last night, and offices reached some agreements on major issues at the eleventh hour – and I mean literally, around 11:00. So *we understandably haven't yet had the opportunity to review all the language reflecting the cuts*. In no way do I want to suggest that the Bureau staff has fallen short by noting the fact *that language reflecting late agreements among commissioners is not yet drafted*. But *I am very uncomfortable voting on this item before the offices have seen the draft orders*, because we all know, the devil is in the details." Separate Statement of Commissioner Jonathan

as quickly as possible."[60] Commissioner Copps' February 20, 2003, statement confirms this: "I am unable to fully sign on to decisions without reservations until there is a final written product," noting that "we finalize the draft in the coming days . . ."[61] Six months later, Commissioner Copps described the February 20, 2003, event as "based on a roughly conceived outline produced under the threat of a judicial deadline."[62] Similarly, Commissioner Abernathy has recently expressed concerns with the post-voting changes to February 20, 2003, outline.[63]

The evidence also shows that a majority of the Commissioners disagreed with the merits of the line sharing decision.[64] Some Commissioners stated that they voted to eliminate line sharing *only* as a compromise to preserve UNE-P, at the expense of line sharing.[65]

S. Adelstein, Approving in Part, Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 2 (rel. Feb. 20, 2003) (emphasis added).

[60] Separate Statement of Commissioner Jonathan S. Adelstein, Approving in Part, Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 5 (rel. Aug. 21, 2003) (emphasis added).

[61] Separate Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 4 (rel. Feb. 20, 2003).

[62] Separate Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 3 (rel. Aug. 21, 2003).

[63] Separate Statement of Commissioner Kathleen Q. Abernathy Approving in Part and Dissenting in Part, CC Dkt. 01-338, at 1 ("the majority has modified the unbundled switching framework since the February 20 decision . . .") and 8 n.27 ("In my February 20 press statement, I noted that the majority had abandoned the previous four-line limit . . . The majority now announces that it is preserving that limit . . .")(rel. Aug. 21, 2003); "FCC Releases Triennial UNE Review Order," Communications Daily, at 2 (Aug. 22, 2003) (discussing differences between February 20th and final order released, and noting that "Comr. Abernathy . . . said she had some questions about making after-vote language changes . . .").

[64] During the open meeting, for example, Commissioner Copps explained that "I have agreed to join certain decisions that are not my preferred outcome in an effort to find compromise and to avoid even more damage to the competition landscape...[*t]here are aspects of this order that are certainly not my preferred approach but which I have had to accept in order to reach a compromise*. In particular, there is this decision to eliminate access to only a part of the frequencies of the loop as a network element. I would have preferred to maintain this access, also known as line sharing. *I believe that line sharing has made a contribution to the competitive landscape. Instead of encouraging it, we provide today only an extended transition period . . .*" Attachment A, hereto, Open Meeting Transcript (as prepared by Miller Reporting Co.) at 12, 14.

[65] *See* Order, n. 782 (majority acknowledges that the line sharing decision was the product of compromise); Separate Statement of Commissioner Jonathan S. Adelstein, Approving in Part,

After the February meeting adjourned with a "roughly conceived outline," the Commission was required to release and publish the rules and order adopted at the meeting; [66] in this case, the process took just over six months. During that period, however, the highly unusual process continued. Specifically, certain private parties, especially Covad and Verizon, were invited to meet with certain Commissioners (or their respective legal staff) after the February 13, 2003, Sunshine Notice to discuss and provide further input on the issues, which had allegedly been voted out on February 20, 2003. The *ex parte* memoranda filed in the docket indicate that there were at least 24 such relevant contacts.[67] Attachment B, hereto, provides a summary of a number of the meetings.

B. The Irregularities Violated the APA, the Sunshine Act, and the *Ex Parte* Rules

1. The Line Sharing Decision Is The Product of an Illegal Private Rulemaking in Violation of APA Section 553 and the Product of Illegal *Ex Parte* Presentations

In a notice and comment rule making, such as this proceeding, Section 553(c) of the APA directs that "the agency shall give interested persons an opportunity to participate in the rule making through the submission of written data, views or arguments with or without opportunity for oral presentation."[68] The FCC's "permit-but-disclose" *ex parte* rules also provide all parties an equal right to participate in the agency rule making process, including responding to other parties' *ex parte* presentations.[69] Here, the evidence shows, however, that the rulemaking on the

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Concurring in Part, Dissenting in Part, CC Dkt. 01-338, at 2 (rel. Feb. 20, 2003) ("There has been a great deal of compromise in this process. I am very comfortable with some of the decisions, while others quite frankly give me pause.").

[66] 5 U.S.C. § 553(d) (Administrative Procedures Act ("APA") requires rules and order to be published no less than 30 days prior to effective date, unless specific exceptions granted).

[67] See Attachment B, hereto, "CC Docket No. 01-338 Ex Parte Contacts After Sunshine Notice (Feb. 13, 2003) and Before Order Release (Aug. 21, 2003)."

[68] 5 U.S.C. § 553(C).

[69] 47 C.F.R. § 1.1206(a)(1) (*ex parte* presentations are permissible in informal rulemaking proceedings provided that the party follows disclosure requirements).

line sharing UNE continued after February 20, 2003, but was not open to all interested parties, including EarthLink. Rather, it was a process open by Commission invitation only that offends Section 553 of the APA.

Rulemaking proceedings are open so that all parties have an equal opportunity to participate fully and respond in a meaningful way to arguments and data presented by others. As the D.C. Circuit has noted, courts demand that agency procedures not treat parties "unfairly," and expect agency procedures that " infuse[] the administrative process with the degree of openness, explanation, and participatory democracy required by the APA."[70] By contrast, a process that is preferential or exclusionary – operating by invitation only, and using the FCC's *ex parte* rules to exclude all others[71] – violates this basic tenet of APA rule making.[72]

The discriminatory process that affords some an advantage in the rule making process is the hallmark of arbitrary decision making that the APA was intended to eradicate.[73] In this proceeding, all parties should have been afforded the opportunity to respond on the record to post-February 20th arguments and data. In EarthLink's case, as a major ISP customer of Covad line-shared DSL services, the adopted transition presents issues unique to EarthLink and

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[70] Weyerhauser Co. v. Costle, 590 F.2d 1011, 1030 (D.C. Cir. 1978) (EPA rule making remanded where agency relied on data not available for public comment; "the Agency's procedures . . . denied petitioners the opportunity to comment on a significant part of the Agency's decisionmaking process as required by section 553 [of the APA]").

[71] From February 13, 2003 until August 21, 2003, the FCC's *ex parte* rules prevented all others from presenting additional arguments or data to the Commission regarding the UNE Triennial Order. 47 C.F.R. § 1.1203(a)&(b).

[72] Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959) (One party to an FCC rule making proceeding should not be allowed to make *ex parte* contacts after the time when all parties were permitted to make such contacts because "basic fairness requires such a proceeding to be carried on in the open.").

[73] *See, e.g.*, Sprint Corp. v. FCC, 315 F.3d 369, 373 (D.C. Cir. 2003) (the purpose of the Section 553 notice requirement is to "expos[e] regulations 'to diverse public comment'" and to "ensur[e] 'fairness to affected parties'" (*quoting* Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F. 2d 506, 547 (D.C. Cir. 1983)).

EarthLink subscribers, and yet this rulemaking process – unlike any other the Commission has ever held – provided no opportunity to respond to the post-February 13, 2003, positions presented by Covad, Verizon and others.[74] Indeed, given that EarthLink was so dramatically impacted, the process may even have violated constitutional due process obligations.[75]

The record shows, however, that a few parties had multiple meetings and submitted written information after the February 20, 2003, meeting. For example, one day after the FCC open meeting, Covad submitted a two-page outline described as "transitional mechanisms to apply if linesharing (sic) is removed as a UNE," which detailed Covad's preferred position on the transition issues.[76] The record shows that, even as late as mid-May, the rulemaking issues were still openly debated between Verizon and Commission staff. Specifically, Verizon's May 19, 2003 five-page letter reflects a May 16, 2003, meeting with Commission staff, argues against Covad's post-February 20, 2003, submittals.[77]

Moreover, if the Commission determines (wrongly, in EarthLink's view) that the Commission did adopt the final Order at the February 20, 2003, meeting, then it is apparent that the more than 20 *ex parte* contacts occurring after the meeting violated the Commission's *ex parte* rules. To be sure, the *ex parte* rules provide a narrow exception to the prohibition on

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[74]See, Section II, above. Neither Verizon nor Covad represent the interests of EarthLink or its subscribers served by line sharing arrangements. Indeed, Verizon opposed line sharing entirely. As for Covad, which surely advocated line sharing, the transition raises issues in which a vendor and customer have some different interests. For example, EarthLink is Covad's customer and the terms of Covad's possible line sharing discontinuance due to regulatory events would mean different interests for Covad and EarthLink.

[75] *See*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 436 U.S. 519, 542 (1977) (in rule making proceeding where small number of participants are "exceptionally affected," "additional procedures may be required to afford the aggrieved individuals due process" (citations omitted)).

[76] Att. B, e*x parte* Letter from Jason Oxman, Covad, to FCC, CC Dkt. No. 01-338 (filed Feb. 24, 2003).

contacts after the February 13, 2003, Sunshine Notice was released.[78] However, if one assumes that the Commission had already resolved extant issues and voted on the final order, this exception would have no application; no "adduction of evidence" would have been necessary. Further, the Covad and Verizon *ex parte* notices underscore that the meetings were not to fill in a minor citation or fact issue; rather, both parties argued over the utility of the line sharing UNE and the best method of transition if the line sharing UNE were eliminated.[79] For *ex parte* purposes, these contacts were at the core of the substance of line sharing and included critical new data on the issue.

The Commission's failure to follow its own rules warrants a reexamination of whether the line sharing decision was, in fact, based on illegal *ex parte* contacts.[80] As the Commission has noted, "the objective [of the *ex parte* rules] is grounded upon basic tenets of 'fair play' and 'due process' that are embodied in the Constitution and other laws and which, we believe, are indispensable to preserving the public's trust and confidence in the integrity of the Commission's processes"[81] and the "major function [of the *ex parte* rules] is to ensure that our decisional

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[77] Att. B, e*x parte* Letter from Suzanne Guyer, Verizon, to FCC, CC Dkt. No. 01-338 (filed May 19, 2003).

[78] 47 C.F.R. § 1.1204(a)(10) (presentation during the Sunshine period permissible where "[t]he presentation is requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or for resolution of issues . . . ").

[79] Attachment B (copy of Covad and Verizon letters outlining positions during post-February 20th meetings).

[80] Columbia Broadcasting System v. United States, 316 U.S. 407, 422 (1942) (FCC's rules "are controlling alike on the Commission and all others whose rights may be affected by the Commission's execution of them"); Sangamon Valley Television Corp., 269 F.2d at 224 (Where *ex parte* violation occurred in FCC rulemaking proceeding, "[a]gency action that substantially and prejudicially violates the agency's rules cannot stand.").

[81] *In the Matter of Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, Report and Order, 2 FCC Rcd. 3011, 3012 (¶ 5) (1987). *See also, In the Matter of Amendment of 47 C.F.R. §1.1200 ET SEQ. Concerning Ex Parte Presentations in Commission Proceedings*, Report and Order, 12 FCC Rcd. 7348, 7349 (¶4) (1997) (FCC rulemaking to improve ex parte

processes are fair, impartial, and otherwise comport with the concept of due process."[82] It is obvious that a failure occurred here.[83]

2. The Vote on an Outline, and Not a Final Order, Violates the Sunshine Act and Invalidates The Results of the February 20th Meeting

At the February 20th open meeting, while a vote was taken, the evidence shows that no final order existed on that day and, even more, that the terms of the final order were not formulated until well after the February 20th meeting. This procedure violates the Sunshine Act, as codified at Section 552b of the APA, which provides that "every portion of every meeting of an agency shall be open to public observation."[84]

As explained in Communications Systems Inc. v. FCC,[85] the Sunshine Act permits the Commission to conduct jointly its business, such as adopting a rulemaking order, through one of two methods: a presumption in favor of voting by open meeting[86] or, in some cases, by circulation. In this proceeding, however, the evidence shows that the Commission had only a "roughly conceived outline" and no final order to adopt at the open meeting. On what date and by what process the order was made final is unclear, and it is exactly this same "closed door" agency decision making that the Sunshine Act was intended to proscribe.[87] In this case, the

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regulations "sought to enhance the ability of the public to communicate with the Commission in a manner that comports with fundamental fairness").

[82] Id., at 3012 (¶ 8).

[83] One tangible example is footnote 787 of the Order, which relies on a Covad *ex parte* filing of February 24, 2003 to justify one aspect of the line sharing transition rule.

[84] 5 U.S.C. § 552b(b). This violation is reversible error, since reviewing courts must "hold unlawful or set aside agency action . . . found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

[85] 595 F.2d 797 (D.C. Cir. 1978).

[86] The Communications Act also suggests a presumption in favor of open public meetings. 47 U.S.C. § 154(j) ("Every vote and official act the (sic) Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested.").

[87] As the D.C. Circuit has noted, the purpose of the Sunshine Act is "to make government more fully accountable to the people. . . . the Act established a general presumption that agency

Commissioners' statements (quoted above) make clear that no final order or rules were adopted on February 20, 2003. Further, the multiple post-February 20th meetings requested by the Commissioners offices, and the *ex parte* notices showing that the line sharing UNE and the transition rule were being debated and had not yet been finalized underscore that no final Order existed. Indeed, there can have been no plausible purpose for the volume of meetings other than to affect the ultimate outcome of the Order.[88]

Nor is it sufficient for the Commission on February 20, 2003, to have reached some tentative arrangement regarding the rough terms of major issues, and then to have reviewed and finalized the final rules and Order six months later. The Sunshine Act is not so easily skirted. Its legislative history makes clear, "[t]he meetings opened by [the Sunshine Act] are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decisionmaking process, not merely its results, must be exposed to public scrutiny."[89] In the same way, once the agency decides that the vote on an order is subject to an open meeting, portions of its final decisional processes of that order cannot be shielded from public view. The Sunshine Act requirements apply to items presented in open meeting votes; "[i]f there is an anomaly here, it was created by the choice of Congress."[90] Since the FCC has conducted no other final meeting to vote on these rules, the February 20th open meeting cannot be propped up as the final vote of the rules and the Order.

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meetings should be held in the open." Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921, 928-929 (D.C. Cir. 1982). Further, "Congress applied the principle of openness to the deliberations of multi-member agencies because it believed that the public should be able to observe the 'give-and-take discussion between agency heads,' each of whom had been selected by the President and confirmed by the Senate." Id., at 930.

[88] Order, n.787 (citing Covad February 24th *ex parte* presentation).

[89] Common Cause, 674 F.2d at 930 (*quoting,* S. Rep. No. 94-354, 94th Cong., 1st Sess, 18 (1975)).

[90] Id., at n. 42.

3. The Failure to Address Line Sharing Solely on its Merits Violates the Communications Act and the APA

As discussed in Section III. A. above, it is clear that Commissioners voted for the elimination of the line sharing UNE even as they disagreed it was in the public interest or furthered the goals of the Communications Act. The Communications Act, however, demands more, and Section 251(d)(2) of the Act commands the Commission to implement rules determining *each* network element that should be available under the relevant statutory standard.[91] The line sharing UNE should have been addressed on the basis of its own merits and not in relation to the merits of another UNE. Such action is simply not consistent with the public interest requirements of the Act or the Commission's Section 251(d) rule making authority.[92]

What several Commissioners and the Order refer to as a "compromise" also violates the Section 706 of the APA because courts are left with no record of the agency's *actual decision making* – the factors, data, and interests actually relied upon by a majority of the Commissioners – upon which to determine whether or not the agency acted within its delegated authority. Indeed, Section 553(c) of the APA demands that agencies incorporate "a concise general statement" of the "basis and purpose" with the rules adopted so that the judiciary can carry out its essential statutory review function. As the Supreme Court has explained, "Section 706(2)(A) [of the APA] requires a finding that *the actual choice made* was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a

[91] 47 U.S.C. § 251(d)(2).
[92] Schurz Communications Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992) (FCC adoption of complex compromise between industry participants is reversible error).

consideration of relevant factors and whether there has been a clear error of judgment."[93] Thus, while the Order (at n. 782) concedes that compromise was involved in the line sharing decision and explains that "compromise" may be an acceptable agency action, the APA also requires the compromise in this proceeding to be explained fully in the Order, and not left as an unwritten subtext impossible for judicial review. While footnote 782 cynically argues that the APA requires only "*a* legal justification"[94] when agency compromise is reached, this is a legal error. The Order failed to explain "the actual choice made" in the compromise, that is, the reasons for the UNE-P/line sharing trade-off. As the *Schurz* court explained,

> "One might be tempted as an original matter to treat an administrative rule as courts treat legislation claimed to deny substantive due process, and thus ask whether on any set of hypothesized facts, whether or not mentioned in the statement accompanying the rule, the rule was rational. . . . But that is not the standard for judicial review of administrative action. It is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational – must demonstrate that a reasonable person upon consideration of all the points urged pro and con the rule would conclude that it was a reasonable response to a problem that the agency is charged with solving."[95]

CONCLUSION

For the foregoing reasons, EarthLink urges the Commission to reconsider the Order. On reconsideration, the Commission should reinstate the line sharing rule nationwide or, as a secondary option, reinstate the rule but allow the state to conduct a more granular analysis of the

[93] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (emphasis added), *rev'd in part on other grounds*, Califano v. Sanders, 430 U.S. 99, 105 (1977); *see also*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable . . . .").
[94] Order, n. 782 (emphasis added).
[95] Schurz Communications Inc., 982 F.2d at 1049.

status of line splitting implementation and availability (within 90 days), consistent with other decisions of the Order.

Respectfully Submitted,

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